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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

MIGUEL JOYNER

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

No. 39547

Ada Co. Case No.
CV-2011-8886

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

**HONORABLE CHERI C. COPSEY
District Judge**

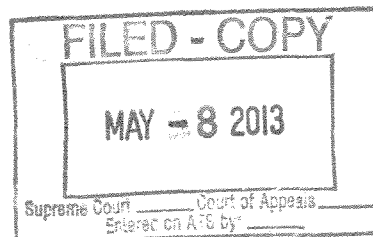
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STATEMENT OF THE CASE

Nature of the Case

Miguel Charles Joyner appeals from the district court's summary dismissal of his petition for post-conviction relief.

Statement of Facts and Course of Proceedings

A jury convicted Miguel Charles Joyner of felony violation of a no contact order and being a persistent violator. State v. Joyner, Unpublished Opinion No. 393, p. 1 (Ct. App. 2010). The district court sentenced Joyner to life in prison with 10 years fixed. Id. Joyner filed a motion to reduce his sentence under Idaho Criminal Rule 35, which was denied. Id. He timely appealed, arguing the sentencing court abused its discretion. Id. The Court of Appeals disagreed, affirming his judgment of conviction and sentence. Id. at 2.

Joyner filed a petition for post-conviction relief.¹ (R., pp. 4-7.) Joyner also requested appointment of counsel (R., pp. 18-20), which the district court granted (R., p. 23). The state filed an answer (R, pp. 38-42) and motion for summary dismissal (R., pp. 44-45, 52-73). Following a hearing on the state's motion, the district court entered a memorandum decision dismissing Joyner's petition. (R., pp. 227-38.) Joyner timely appealed. (R., pp. 240, 242-44.) The district court granted Joyner's request for appointment of the State Appellate Public Defender. (R., pp. 247-48.)

¹ Joyner filed an amended petition with assistance of counsel, in which he asserted ineffective assistance by both trial and appellate counsel. (R., pp. 30-36.)

In June 2012, Greg Silvey substituted for the State Appellate Public Defender as conflict counsel for Joyner. (6/29/12 Letter.) However, in October, Silvey moved to withdraw. (10/12/12 Motion.) The basis for the motion was that Joyner had no right to counsel, and Silvey was unable to identify a non-frivolous issue to be raised on appeal, upon his conscientious review of the record. (10/12/12 Memorandum.) This Court granted the motion, recognizing that, absent receipt of a notice of appearance from substitute counsel, Joyner would proceed representing himself. (10/23/12 Order.) Joyner filed his appellate brief, pro se, to which the state now responds.

ISSUES

Joyner, representing himself, states the issues on appeal as:

1. JURY INSTRUCTION # 13.
2. THE USE OF NO CONTACT ORDER AS PEOPLE'S EXHIBIT A.
3. NOT BEING ABLE TO HAVE AN EVALUATION DONE. THE STATE OF MIND I WAS IN.
4. THE REASONING BEHIND THE PHONE CALLS TO MS. LARD.
5. THE RULES OF THE PURPORTED NO-CONTACT ORDER. IS IT RETROACTIVE.

(Appellant's brief, p. 1 (verbatim).)

The state rephrases the issues as:

Has Joyner failed to show error in the district court's dismissal of his post-conviction petition?

ARGUMENT

Joyner Has Failed To Show The District Court Erred In Denying His Petition For Post-Conviction Relief

A. Introduction

Joyner identifies five issues on this appeal. (Appellant's brief, p. 1.) One issue, the "reasoning behind the phone calls," appears to be background or a statement of alleged fact rather than an argument why the district court erred. Three issues challenge the district court's analysis of ineffective assistance of counsel arguments in Joyner's post-conviction petition. And the final issue – about having an evaluation done – was raised for the first time on this appeal. The state discusses Joyner's arguments as follows.

B. Standard Of Review

Petitions for post-conviction relief under Idaho's Uniform Post-Conviction Procedure Act, I.C. § 19-4901 et seq., are governed by Idaho's Rules of Civil Procedure. Ridgley v. State, 148 Idaho 671, 674, 227 P.3d 925, 928 (2010) (citation omitted). To avoid dismissal, a petition must state more than that required under Rule 8(a)(1). Id. It must provide specific grounds on which the application is based, along with admissible supporting evidence. Id. at 675, 227 P.3d at 929 (citation omitted); I.C. § 19-4903.

The district court may, on a party's motion or its own initiative, summarily dismiss (without a hearing) a petition for post-conviction relief. I.C. § 19-4906; Ridgley, 148 Idaho at 675, 227 P.3d at 929. The procedure for summary dismissal is equivalent to that for a summary judgment motion under I.R.C.P. 56.

Ridgley, 148 Idaho at 675, 227 P.3d at 929 (citation omitted). Thus, dismissal is appropriate on determination that no “genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file.” Id.

The court will regard petitioner’s undisputed factual allegations as true, id. (citation omitted), and “will liberally construe the facts and reasonable inferences in favor of the non-moving party,” Charboneau v. State, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007) (Charboneau II). However, the court need not accept “mere conclusory allegations[] unsupported by admissible evidence, or the applicant’s conclusions of law.” Ridgley, 148 Idaho at 675, 227 P.3d at 929 (citation omitted). When reviewing a district court’s summary dismissal of a petition for post-conviction relief, the appellate court applies the same standard as that applied by the district court. Id.

C. Ineffective Assistance Of Counsel Claims

In his post-conviction petition, Joyner asserts ineffective assistance by trial and appellate counsel. To establish a claim of ineffective assistance of counsel, a petitioner must show both that his counsel performed deficiently, and that his defense was prejudiced as a result. Ridgley, 148 Idaho at 675, 227 P.3d at 929 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). The claimant has the burden of showing that counsel’s representation fell below an objective standard of reasonableness, Strickland, 466 U.S. at 688, and but for counsel’s deficient performance, it is reasonably probable the outcome would have been different, Id. at 694. There is a strong presumption that counsel has performed competently. Id. at 690.

The district court properly rejected Joyner's claims for failure to raise a genuine issue of fact.

1. Trial Counsel's Failure To Object To Jury Instruction 13

Joyner raised two ineffective assistance of trial counsel issues in his post-conviction petition. The first is trial counsel's failure to object to Jury Instruction 13, which did not require a finding that Joyner was charged with or convicted of an underlying offense. (R., pp. 33, 235; Appellant's brief, p. 2.) The record shows that trial counsel did not object, but stipulated to Jury Instruction 13. (See R., p. 235.) However, the record does not show that counsel's stipulation to the instruction was objectively unreasonable.

Comments to the Idaho Criminal Jury Instruction for Violation of No Contact Order anticipate a defendant may stipulate to having been charged with or convicted of an offense for which the no contact order was issued. Comments to ICJI 1282 (instruction should be given unless defendant has so stipulated). This flexibility allowed in the jury instruction comments reflects that a stipulation to the underlying charge or conviction may be a tactical choice. The court on appeal will not second guess strategic decisions by trial counsel "unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation." Barcella v. State, 148 Idaho 469, 477, 224 P.3d 536, 544 (Ct. App. 2009) (citation omitted). There is no evidence that trial counsel's stipulation here was based on anything other than trial strategy. Because Joyner presented no claim or evidence that

counsel's strategic decision was objectively unreasonable, he failed to present a prima facie case of deficient performance.

Even if Joyner had presented a viable claim that the stipulation amounted to deficient representation, the district court properly rejected Joyner's claim if he failed to show prejudice. Ridgley, 148 Idaho at 675, 227 P.3d at 929. Here, Joyner failed to demonstrate a genuine issue that he suffered prejudice from trial counsel's stipulation to Jury Instruction 13. According to Joyner, counsel should have demanded an instruction that the state had to show Joyner was charged with or convicted of attempted strangulation, which gave rise to the no contact order. (See R., p. 33.) Such instruction might have helped Joyner were there a question concerning the validity of his underlying conviction and no contact order. But here, Joyner acknowledges that the no contact order was valid. (Appellant's brief, p. 2.) Joyner thus makes no showing how his counsel's stipulation prejudiced his case. Accordingly, his ineffective assistance of counsel argument fails.

2. Trial Counsel's Failure To Object To References To The Underlying Offense

Joyner's second issue is trial counsel's failure to object to references to Joyner's attempted strangulation of the victim, as prejudicial and lacking in probative value under Rule 404(b). (R., pp. 34, 237; Appellant's brief, p. 2.) The district court concluded Joyner had failed to present more than a "conclusory allegation" that counsel's performance was deficient or that Joyner was prejudiced. (R., p. 237.) Joyner has not established that counsel could have excised from the trial all reference to the basis for issuing the no-contact order.

Even if counsel could have done so, Joyner failed to show a viable claim of prejudice given the overwhelming evidence at trial. That evidence included testimony and documentary evidence that Joyner attempted to call the victim more than 90 times, and recorded phone calls in which Joyner asked a third party to contact the victim (also prohibited under the no contact order). (R., p. 237.) Again, Joyner does not dispute the validity of the no contact order. (Appellant's brief, p. 2.) Joyner has not demonstrated his trial would have concluded differently had references to the basis for issuing the no-contact order been kept from the jury. Thus, Joyner's second ineffective assistance of trial counsel claim also fails.

3. Appellate Counsel's Failure To Challenge Jury Instruction 13

In his post-conviction petition, Joyner asserted his appellate counsel performed deficiently by failing to challenge Jury Instruction 13. (R., p. 35.) According to Joyner, appellate counsel's failure to raise the issue denied him due process. (R., p. 35.) Other than this bare and conclusory assertion, Joyner provided no evidentiary or legal support. (R., p. 35.) In fact, it is unclear what challenge appellate counsel should have raised.

To the extent Joyner was arguing appellate counsel should have raised an ineffective assistance of trial counsel argument, the claim would properly have been dismissed due to incompleteness of the evidentiary record. State v. Doe, 136 Idaho 427, 433, 34 P.3d 1110, 1116 (Ct. App. 2001) (ineffective assistance of counsel claims usually reserved for post-conviction proceedings where more complete evidentiary record can be developed). If Joyner was

arguing appellate counsel should have asserted trial court error, his claim would have failed because trial counsel stipulated to the instruction. (R., p. 235.) As already discussed, comments to the Idaho Criminal Jury Instructions support that the instruction was appropriate upon counsel's stipulation. Comment to ICJI 1282. Given the dearth of evidence or law to support his claim, Joyner failed to establish that appellate counsel's representation was objectively deficient, or that it resulted in prejudice. The district court thus properly rejected the claim.

4. Appellate Counsel's Failure To Raise A Claim Of Inadequate Notice In The No Contact Order

Joyner also argued appellate counsel failed to assert lack of notice about potential penalties for violating the no contact order. (R., p. 35.) Joyner again failed to demonstrate the requisite elements for an ineffective assistance of counsel claim in his post-conviction petition. According to Joyner, he was entitled to notice that a third conviction for violating a no contact order within five years could result in a felony conviction with enhanced penalties. (R., p. 35.) Joyner contended that appellate counsel provided ineffective assistance in failing to raise this argument on direct appeal. (R., p. 35.) However, the argument is a novel one.

No case law, at the time of Joyner's appeal or now, addresses the issue. In general, an appellate counsel's failure to advance "a novel theory in an undeveloped area of law" is not deficient performance. Schoger v. State, 148 Idaho 622, 630, 226 P.3d 1269, 1277 (2010). Even if counsel had raised the issue, Joyner has not shown it was likely to succeed. Joyner has failed to show

either deficient performance by appellate counsel, or prejudice. Thus, his ineffective assistance of appellate counsel claim also fails.

D. New Claim Regarding Denial Of Mental Health Evaluation

Joyner's final issue on appeal is that he was denied a mental health evaluation. (Appellant's brief, p. 2.) It is unclear whether Joyner ascribes this failure to counsel for failing to request it, or to the trial court for failing to order it. Regardless, the issue fails because Joyner failed to raise it below. The courts on appeal "will not consider issues that are presented for the first time on appeal." State v. Fodge, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Accordingly, the Court here must reject Joyner's new issue on this appeal.

For the foregoing reasons, Joyner has failed to demonstrate a valid issue warranting his requested relief.

CONCLUSION

The state respectfully requests that the Court affirm the district court's denial of Joyner's petition for post-conviction relief.

DATED this 8th day of May, 2013.


DAPHNE J. HUANG
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of May, 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

MIGUEL CHARLES JOYNER, #24330
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PO BOX 70010
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DAPHNE J. HUANG
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DJH/vr